No. 80-471

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In the Supreme Court of the United States

OCTOBER TERM, 1980

SUN PETROLEUM PRODUCTS COMPANY, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CARIN ANN CLAUSS
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for Occupational Safety and Health

LOIS G. WILLIAMS
Deputy Associate Solicitor for Special Litigation

ALLEN H. FELDMAN
Counsel for Appellate Litigation

JOSEPH M. WOODWARD
THOMAS L. HOLZMAN
Attorneys
Department of Labor
Washington, D.C. 20210

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QUESTIONS PRESENTED

1. Whether the Secretary of Labor may withdraw from a settlement agreement pending before the Occupational Safety and Health Review Commission if the Secretary has determined that the agreement does not adequately abate a known hazard and is therefore contrary to public policy.

2. Whether the court of appeals lacked jurisdiction to consider the question of the Secretary's power to withdraw from a pending settlement agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 622 F.2d 1176. The decision of the Occupational Safety and Health Review Commission (Pet. App. 38a-44a) is reported at 1979 OSHD ¶ 23,502. The order of the Review Commission's administrative law judge (Pet. App. 45a-48a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1980. A petition for rehearing was denied on June 26, 1980 (Pet. App. 37a). The petition for a writ of certiorari was filed on September 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The facts giving rise to this litigation are not in dispute. A gas explosion at petitioner's Marcus Hook, Pennsylvania refinery on June 19, 1976, fatally injured two workers. A compliance officer of the Occupational Safety and Health Administration (OSHA) then inspected the worksite, and on August 3, 1976, the Secretary of Labor issued a citation charging petitioner with, *inter alia*, failure to monitor combustible gases during turn-around operations, in violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. 654(a)(1).[1] Petitioner was served with two proposed penal-

[1] Section 5(a)(1) requires each employer to "furnish to each of his employees employment and a place of employ-

ties of $700 each and ordered to abate the violation immediately (Pet. App. 3a-4a).

Petitioner contested the citation. Local Union 8-901 of the Oil, Chemical, and Atomic Workers International Union, the authorized bargaining representative of the Marcus Hook employees, elected and was granted party status. See 29 C.F.R. 2200.20. The case was assigned to an administrative law judge of the Occupational Safety and Health Review Commission for hearing (Pet. App. 4a).

On January 10, 1977, prior to the hearing, the Secretary and petitioner entered into a settlement agreement (Pet. App. 49a-51a). Under the settlement, the amount of the penalties was reduced and petitioner agreed to institute gas tests and engineering and procedural changes to prevent recurrence of the accident. In addition, petitioner agreed to develop a gas testing manual within three months. Specifically, the agreement provided that "gas test[s] will be taken by persons knowledgeable in the care, use, and reading of the instrument, and familiar with locations where combustible gases or vapors may be present or have collected" (*id.* at 49a).

On January 19, 1977, the Union filed objections to the settlement with the administrative law judge. The Union alleged that the agreement was deficient because it did not specify that gas testing could only be performed by workers specifically classified as "gas testers" and therefore presented a danger that unqualified employees might perform the work (Pet. App. 4a-5a). After holding a prehearing conference

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ment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

concerning the Union's objections, the judge issued an order on April 25, 1977, approving the settlement (*id.* at 45a-51a). The judge ruled that under 29 U.S.C. 659(c) the Union had no authority to object to the settlement on the basis of the provision concerning gas testing.

Pursuant to 29 U.S.C. 661(i), a member of the Review Commission then issued a sua sponte direction that the judge's order be reviewed by the full Commission. While the case was pending before the Commission, the Secretary undertook a reevaluation of the settlement agreement, which included meeting with petitioner's attorneys. On July 31, 1978, the Solicitor of Labor, on behalf of the Secretary, informed petitioner by letter that the Secretary had determined that the agreement did not fully abate the hazard and was contrary to public policy because only the use of employees whose full time occupation was gas testing would adequately effectuate the Act's purposes (Addendum A to the Secretary's opening brief in the court of appeals in No. 79-1822). The Secretary concluded that the case should be remanded by the Review Commission to the administrative law judge for renegotiation of the settlement or, if no agreement could be reached, for a hearing on the merits (*id.* at 4). The Secretary informed the Review Commission of this position in a Response to the Direction for Review dated September 18, 1978.

On April 27, 1979, the Commission issued its decision (Pet. App. 38a-44a), in which only two of the three commissioners participated.[2] The two commis-

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[2] The third commissioner had appeared as counsel to the Union at the prehearing conference before the administrative law judge and therefore recused himself (Pet. App. 38a).

sioners disagreed on the proper disposition of the case and therefore decided to affirm the judge's order approving the settlement by an equally divided vote, ruling that the affirmance had no precedential status (Pet. App. 39a, 44a). With respect to the Secretary's notice of withdrawal from the settlement, the commissioner who voted to affirm agreed with petitioner that the Secretary's response should not be considered. The other commissioner felt that petitioner's objections to the Secretary's response were moot in light of his vote to remand the settlement because of the Union's objections (Pet. App. 42a n.3).

2. Both the Union and the Secretary appealed the Commission's decision. The court of appeals reversed, holding that the Secretary has the authority to withdraw from a settlement agreement pending before the Commission prior to the entry of the Commission's final decision (Pet. App. 21a-24a).[3] The court relied primarily on "the Secretary's unique role in effectuating the purposes of OSHA" (*id.* at 23a). As the court explained, the Act vests broad administrative and prosecutorial powers in the Secretary, including the power to enter into settlement agreements. In exercising this power, the Secretary attempts to implement the Act's basic policy to " 'assure so far as possible every working man and woman in the Nation safe and healthful working conditions.' 29 U.S.C. 651(b)" (*ibid.*). If the Secretary concludes, upon reexamination, that an agreement does not adequately effectuate that policy, the Secretary should

[3] In view of this holding, the court denied petitioner's motion to dismiss the Secretary's petition for review on the ground that his objections to the settlement agreement had not been timely presented to the Commission (Pet. App. 25a n.23).

withdraw from the agreement in order to discharge his statutory responsibility properly (*id.* at 23a-24a). Moreover, the court stated, the power to withdraw from a settlement agreement prior to final Commission action comports with the congressional plan to assure coherent and effective administration of the Act by concentrating administrative authority in the Secretary (*ibid.*).

Given this conclusion, the court added that, if the Secretary withdraws from a settlement, "dictates of fairness and justice" require that all parties be placed in the position they occupied before issuance of the citation (Pet. App. 24a). Accordingly, the court ruled that the Secretary would not be permitted to rely on the existing citation, and he would be authorized to reinstitute proceedings against petitioner only on the basis of a new inspection and a new citation, if warranted (*ibid.*). Judge Pollak dissented in part, on an issue not raised in the petition (*id.* at 25a-36a).

ARGUMENT

1. Petitioner contends (Pet. 21-26) that the court of appeals erred in holding that the Secretary had authority to withdraw from the settlement agreement. This contention is without merit. Moreover, this issue is one that arises most infrequently,[4] and there is no need for further review by this Court.

Petitioner's principal contention (Pet. 23-26) is that the decision below violates "traditional notions of fairness and due process" (Pet. 21) in permitting the Secretary to withdraw from the agreement with-

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[4] Since the passage of the Act, the Secretary has withdrawn from two settlements over the objection of employer counsel and renegotiated two others, out of a total of more than 35,000 settlements.

out a showing of either a breach of the agreement, a subsequent independent violation, or newly obtained evidence that the agreement is not in the public interest. For this proposition, petitioner relies on decisions concerning the power of the National Labor Relations Board to withdraw from a settlement agreement, primarily *Wallace Corp.* v. *NLRB*, 323 U.S. 248 (1944). This contention is unpersuasive for several reasons.

First, as the Court noted in *Wallace*, the NLRB has the power to fashion its procedures to achieve the purposes of the National Labor Relations Act. 323 U.S. at 253. Similarly, the Secretary has the power to fashion his procedures to effectuate the purpose of the Occupational Safety and Health Act to assure "safe and healthful working conditions." 29 U.S.C. 651(b). But the limitations on this power suggested under the NLRA precedents should not necessarily be applied to the same degree in the OSHA context. As this case illustrates, violations of the Occupational Safety and Health Act may place lives in jeopardy. Because of the severe consequences that can result from a hazard in the workplace, the Secretary may be entitled to greater latitude in withdrawing from a settlement that, in his considered judgment, does not adequately abate a known hazard than the NLRB would have under similar circumstances.

Second, the restrictions on withdrawal described in *Wallace* have no application here. In *Wallace*, this Court permitted the Board to retreat from a *final* settlement agreement that subsequent events had proved to be inadequate to accomplish its purpose. The Court did not establish any limitations on the Board's power in this regard, but it expressed approval of the Board's "working rule" that it ordin-

arily would not withdraw from such agreements unless subsequent events indicated that the agreement had been ineffective. 323 U.S. at 254. To the extent that *Wallace* should be applied to limit the Secretary's authority to withdraw from a settlement agreement under the Act, it clearly applies only to a *final* agreement.[5] Here, however, the settlement agreement was still pending before the Commission and therefore had not become final and enforceable.

Withdrawal from a settlement agreement before it becomes final results in no cognizable prejudice to the employer. Where, as here, the validity of a settlement agreement is under review by the Commission, the employer is not yet under any obligation to implement the agreement. See 29 U.S.C. 659(b), 666(d); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 9 n.11 (1980). In this case, the settlement never became final prior to the Secretary's notice of intent to withdraw because the Union vigorously contested the settlement and its challenge was still pending before the Commission. Indeed, it was the very provision to which the Union objected—authorizing employees other than full-time gas testers to test for combustible gas—that led the Secretary to withdraw from the agreement. Petitioner thus was aware at all times that the provision in question might not be upheld. Moreover, the court of appeals' ruling generally guards against prejudice by requiring that the parties be returned to the status quo ante the issuance of the citation (Pet. App. 24a). Accordingly, there is no basis for petitioner's assertion (Pet. 25)

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[5] Similarly, the court of appeals cases relied on by petitioner (Pet. 24-25) involved NLRB settlements that had become final by virtue of approval by the Board or its authorized representative.

that it was unfairly prejudiced by the Secretary's withdrawal from the agreement.[6]

Finally, the Secretary's action here did not violate the limitations suggested in *Wallace* on withdrawal by the NLRB. The Secretary presented a detailed explanation of the basis for his conclusion, after further examination, that the provision of the settlement agreement concerning gas testing was ineffective and "will not result in full abatement of the hazard" (Addendum A, *supra*, at 2). The factors that influenced the Secretary included: (1) the fact that gas testing is a complex skill requiring detailed knowledge and the exercise of informed judgment best developed after years of experience (*id.* at 3);[7] (2) the inherent conflict between production goals and safety goals when production workers are used as gas testers (*id.* at 2); and (3) the conclusion that petitioner's training program for gas testing was inadequate (*id.* at 3). The Secretary thus had ample reason to conclude that the agreement was ineffective to achieve its purpose of ensuring employee safety.

2. Petitioner also contends (Pet. 13-21) that the court of appeals lacked jurisdiction to consider the question of the Secretary's authority to withdraw

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[6] As the court of appeals pointed out (Pet. App. 24a), to the extent petitioner has made improvements at the worksite in response to the settlement, it does not lose the benefits of those improvements. They will be reflected in any new inspection and evaluation that must be made by the Secretary because of the withdrawal from the settlement.

[7] This conclusion was also reached by an arbitrator, in an award affirmed by a federal district court, in interpreting the collective bargaining agreement between petitioner and the Union to bar the use of dock personnel for gas testing. See *Sun Oil Co.* v. *Local 8-901, Oil, Chemical and Atomic Workers Union*, 421 F. Supp. 1376 (E.D. Pa. 1976).

from the settlement because, in its view, the Secretary had not raised his objections to the settlement before the Commission in a timely fashion. This contention is insubstantial. In fact, the Secretary did file a statement with the Commission advising it that he had concluded that his responsibilities required him to withdraw from the settlement agreement. This statement was filed shortly after the Secretary reached this conclusion and communicated it to petitioner on July 31, 1978.[8] The statement was noted by the Commission, although it did not consider the effect of the withdrawal (Pet. App. 42a n.3). Thus, the Secretary's position was before the Commission.

In any event, the court of appeals summarily rejected petitioner's contention (Pet. App. 25a n.23) because the exhaustion doctrine has no application here. The Secretary's decision to withdraw raises no issue that merits a determination by the Commission. If, as the court held, the Secretary has the power to withdraw from a settlement agreement while it is pending before the Commission, the withdrawal ends the need for further consideration by the Commission. If the Commission, after being notified of the Secretary's withdrawal, fails to act in light of that withdrawal, the court of appeals must be permitted to correct the error.

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[8] Petitioner apparently claims that this filing was not timely because it was not made at the time the Commission commenced its review. It was impossible, of course, for the Secretary to have notified the Commission of his intention to withdraw at that time because he had not yet reevaluated the settlement agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for
Occupational Safety and Health

LOIS G. WILLIAMS
Deputy Associate Solicitor for
Special Litigation

ALLEN H. FELDMAN
Counsel for Appellate Litigation

JOSEPH M. WOODWARD
THOMAS L. HOLZMAN
Attorneys
Department of Labor

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